

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

OPPOSITION

OF THE

COALITION OF RURAL TELEPHONE COMPANIES

September 2, 1999

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TABLE OF CONTENTS

| | |
|---|----|
| SUMMARY | iv |
| I. INTRODUCTION | 2 |
| II. BACKGROUND: THE SOUTH DAKOTA PUC DECISION | 4 |
| A. APPLICATION | 4 |
| B. HEARING | 5 |
| C. DECISION | 10 |
| III. WESTERN WIRELESS HAS NOT ESTABLISHED A BASIS FOR PREEMPTION UNDER SECTION 253 | 12 |
| A. SECTION 253(a) REQUIREMENTS | 12 |
| B. IF THE COMMISSION FINDS A VIOLATION OF SECTION 253(a), IT MUST THEN CONSIDER WHETHER THE STATE’S ACTION IS WITHIN ITS AUTHORITY UNDER SECTION 253(b) | 15 |
| C. ETC DESIGNATION IS NOT ENTRY REGULATION | 16 |
| D. IN EVALUATING A SECTION 214(e) APPLICATION, STATES PROPERLY CONSIDER WHETHER DESIGNATION WILL SERVE THE PURPOSES OF SECTION 254 | 17 |
| E. THE 5TH CIRCUIT DECISION EMPHASIZES THE BROAD SCOPE OF A STATE COMMISSION’S EVALUATION OF A SECTION 214(e) APPLICATION | 19 |
| IV. THE SD PUC WAS JUSTIFIED UNDER THE LAW AND THE FACTS IN REFUSING TO DESIGNATE WW AS AN ETC SOLELY ON PROMISES | 20 |
| A. THE <i>SD PUC DECISION</i> IS CONSISTENT WITH THE PLAIN MEANING OF THE CONTROLLING STATUTE | 20 |
| B. THE COMMISSION’S PREVIOUS STATEMENTS REGARDING DESIGNATION AND THE RIGHT TO RECEIVE SUPPORT ARE CONSISTENT WITH THE SD PUC CONCLUSIONS | 23 |
| C. WW HAS NOT BEEN PROHIBITED FROM PROVIDING ANY INTRASTATE OR INTERSTATE SERVICE | 24 |

| | | |
|-------|--|----|
| V. | ASSUMING <i>ARGUENDO</i> THAT “INTENT” AND “COMMITMENT” WERE SUFFICIENT, WW HAS NOT SATISFIED EVEN THESE CONDITIONS AS A FIRST STEP | 27 |
| VI. | PREEMPTION DOES NOT AFFECT STATES’ RIGHTS AND RESPONSIBILITIES TO CONSIDER AND DECIDE THE PUBLIC INTEREST WITH RESPECT TO THE POTENTIAL IMPACT OF ETC DESIGNATIONS ON SERVICE IN RURAL TELEPHONE COMPANY AREAS | 29 |
| VII. | THE PUBLIC INTEREST CANNOT BE PROPERLY CONSIDERED BECAUSE THE POLICIES REMAIN UNRESOLVED WITH RESPECT TO UNIVERSAL SERVICE AND THE TREATMENT OF COMPETITIVE ETCs | 32 |
| A. | THE REGULATORY TREATMENT AND STATUS OF FIXED SERVICES OF CMRS PROVIDERS REMAINS UNSETTLED | 33 |
| B. | UNIVERSAL SERVICE PROVISIONS ARE INCOMPLETE | 34 |
| C. | THE RULES THAT WOULD PROVIDE SUPPORT TO COMPETITIVE ETCs BASED ON THE INCUMBENT’S SUPPORT (<i>i.e.</i> , “PORTABILITY”) ARE FLAWED AND HARMFUL TO UNIVERSAL SERVICE | 38 |
| D. | THE DISPARATE AND UNCERTAIN APPLICATION OF INTERCONNECTION AND LEC REQUIREMENTS TO CMRS PROVIDERS IS AN ADVERSE PUBLIC INTEREST CONSIDERATION | 42 |
| E. | SUBSTITUTABILITY IS ALSO AN IMPORTANT PUBLIC INTEREST CONSIDERATION | 43 |
| VIII. | ASSUMING <i>ARGUENDO</i> THAT THE COMMISSION DETERMINES TO ACT AGAINST SOUTH DAKOTA, THEN PREEMPTION MUST BE TAILORED NARROWLY | 45 |
| IX. | CONCLUSION | 47 |

SUMMARY

The Coalition of Rural Telephone Companies submits this Opposition to the Petition seeking preemption of a South Dakota Public Utilities Commission (“SD PUC”) decision not to designate Western Wireless (“WW”) as an Eligible Telecommunications Carrier (“ETC”). The preemption request is erroneously premised on the suggestion that the SD PUC decision constitutes a “barrier to entry” under the Act.

This Opposition demonstrates that the SD PUC decision does not prohibit WW from providing any service, and WW has not shown that the ETC decision has the effect of prohibiting WW from providing any service. Therefore, there exists no “barrier to entry” to be preempted. Instead, the SD PUC decision reflects the SD PUC’s evaluation of an evidentiary record which demonstrated numerous inconsistencies and a clear lack of sufficient factual support for WW’s ETC designation. Moreover, the SD PUC decision is within the authority granted States under Sections 214(e), 253, and 254 of the Act, including States’ authority to determine both the public interest and whether to authorize a second ETC in areas served by rural telephone companies. Accordingly, the WW petition should be dismissed.

WW’s ETC requests in several states have been cursory, vague, internally inconsistent, and lacking in detail. WW simply recites that it is a cellular carrier, that it intends to offer fixed service, and that it promises to meet the universal service requirements. The SD PUC conducted a thorough proceeding and made many detailed findings of fact, supported by the hearing record, and reached conclusions of law based upon these findings of fact. Among many other findings, the SD PUC found that the speculative and novel nature of the technical and service characteristics of WW’s “wireless local loop” precluded any definitive findings with respect to the manner in which WW would meet the ETC requirements. The SD PUC found that WW currently

does not offer, does not advertise, and does not provide the wireless loop service. Moreover, the SD PUC found that WW failed to show that it had a feasible financial and pricing plan consistent with expected ETC universal service objectives.

In its preemption request, WW failed to establish a basis for preemption under Section 253. Assuming, *arguendo*, that the SD PUC decision violates Section 253(a), the Commission must still consider whether the decision is within the SD PUC's authority under Section 253(b) with respect to preserving and advancing universal service. Moreover, States have explicit authority to designate ETCs, and the Act necessarily contemplates that the authority to grant an ETC designation also includes the authority to deny such designations. Therefore, adverse designation rulings do not, on their face, constitute "barriers to entry."

Contrary to WW's arguments, the universal service provisions of the Act are relevant to ETC designation determinations and properly should be considered by States. Moreover, the U.S. Court of Appeals for the Fifth Circuit has ruled that states can consider and require broad and additional conditions for ETC designation.

The SD PUC's action is, in any event, consistent with the controlling law and facts. A carrier must currently offer and advertise the price for services to be supported by universal service funds as a condition of ETC designation. Even if "intent" and "commitment" were sufficient, WW has not satisfied these conditions even as a threshold matter.

In the context of state ETC decision-making generally, state commissions are required to make a public interest determination with respect to designations. However, the public interest cannot properly be considered because many universal service policies and rules remain unresolved with respect to the treatment of potential competitive ETCs. Accordingly, the Commission should promptly resolve the outstanding policy issues outlined in this Opposition.

For example, the regulatory treatment of fixed services of CMRS providers awaits resolution; universal service mechanisms governing so-called “portable” support either cannot be applied, are arbitrary, or are counter-productive to universal service objectives in their current interim form; and the usage minimum required of ETCs should be settled. Furthermore, the disparate, uncertain application, or inapplicability of local exchange carrier requirements with respect to CMRS providers, including the application of equal access, resale, number portability, and other requirements with which all other ETCs must comply, present adverse public interest considerations. Finally, the ability of a second ETC to provide service to all (*i.e.*, substitutability) is a relevant factor in states’ ETC determinations.

Assuming *arguendo* that the SD PUC is preempted, States fully retain their rights and responsibilities to consider and decide the public interest, particularly with respect to the potential impact of ETC designations in rural telephone company areas. Any preemption action must be tailored narrowly as the Act requires. At a minimum, the SD PUC should be afforded an opportunity to consider further WW’s designation request in light of the other provisions of the Act, any new Commission conclusions, and the public interest consideration.

For these reasons, the Commission should reject WW’s request and dismiss its Petition.

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Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

**OPPOSITION
OF THE
COALITION OF RURAL TELEPHONE COMPANIES**

The Coalition of Rural Telephone Companies ("Coalition")¹ respectfully submits this Opposition to the Petition for Preemption filed on June 23, 1999, by Western Wireless Corporation ("WW") and its wholly-owned subsidiary, GCC Licence Corporation ("WW Petition").² WW seeks Commission preemption of a decision of the South Dakota Public Utilities Commission ("SD PUC") not to designate WW as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214(e) of the Communications Act of 1934, as amended ("Act").³ WW seeks preemption of the SD PUC decision⁴ on the basis that the decision

¹ The members of the Coalition are state-organized groups of rural local exchange carriers ("LECs"). The Coalition includes 29 LEC members of the State Independent Telephone Association of Kansas, 21 Independent LECs in Minnesota, and 18 Independent LECs in Nebraska. Each of the 68 rural LECs is a "rural telephone company" as that term is defined in the Act. See 47 U.S.C. § 153(37). All of the LEC members of the Coalition have been designated ETCs by their respective state regulatory authorities.

² See *Public Notice*, DA-1356, released by the Commission on July 19, 1999. The comment dates were extended by *Order*, DA 99-1535, released by the Commission on August 4, 1999.

³ 47 U.S.C. § 214(e).

⁴ *Findings of Fact and Conclusions of Law; Notice of Entry of Order*, TC 98-146, In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, (May 19, 1999) ("*SD PUC Decision*").

constitutes a “barrier to entry” under Section 253 of the Act.⁵

I. INTRODUCTION

As these Comments demonstrate, the *SD PUC Decision* does not prohibit WW from providing any service, and WW has not shown that the *SD PUC Decision* has the effect of prohibiting WW from providing any service. Therefore, there is no “barrier to entry” to be preempted. Instead, the *SD PUC Decision* reflects the SD PUC’s evaluation of an evidentiary record which demonstrated numerous inconsistencies and a clear lack of sufficient factual support for WW’s ETC designation. The *SD PUC Decision* is supported by substantial evidence. Moreover, the *SD PUC Decision* is within the authority granted States under Sections 214(e), 253, and 254 of the Act, including States’ authority to determine both the public interest and whether to authorize a second ETC in areas served by rural telephone companies. Accordingly, the WW Petition should be dismissed.

In addition, the issues presented by the WW Petition and similar ETC proceedings in many States demonstrate that there is a crucial need for Commission attention to its incomplete universal service policies and rules. Several key aspects of the provisions are undefined or unworkable, and others are actually counter-productive to universal service objectives. As a result, the States are impeded in conducting a meaningful examination of the public interest considerations and effects. Therefore, in order to provide South Dakota and other states with the ability to fully evaluate competitive ETC applications, the Commission should begin to resolve the outstanding policy issues outlined in these comments.

The Coalition members bring to this proceeding a distinct public interest and rural commitment perspective. The members of the Coalition provide telecommunications services to

⁵ 47 U.S.C. §§ 253(a), (d).

residents and businesses in areas that are generally characterized by low customer density, relatively lower volumes of usage, and higher per-unit network costs on both a per-customer and on a per-service provided basis. Over several decades, the Coalition members have brought quality telecommunications services to their respective rural areas despite the network coverage challenges presented by these characteristics.

At times during the first half of this century, the telecommunications marketplace was characterized by multiple providers and less regulation. During this time, there was no or only limited capital committed to telecommunications networks and services in rural areas. Universal service networks were eventually built only after affordable capital loan sources became available and regulation promoted the development of sufficient and predictable cost allocation and recovery plans.

The locally-owned and operated telephone companies such as the Coalition members emerged under these regulatory policies to fulfill the telecommunications services' needs of their rural communities. The development of quality networks in these areas has been aided by the federal and state policies that have led to cost recovery sources derived from toll and access services and more recently from explicit universal service mechanisms.⁶ These cost recovery sources have allowed the Coalition members to continue to commit the capital necessary to build and operate networks in their economically challenging areas. The regulated, primarily single-provider environment of the past has afforded policy makers the ability to coordinate this plan with stable, predictable, and productive results. The results have led to virtually ubiquitous

⁶ These companies recover a portion of their high network costs through the universal service fund ("USF") based on the cost of those networks as recorded using standard financial accounting. This actual recorded cost method is in contrast to the approach that would apply to competitive ETCs (including potentially WW) that would receive high cost support under the interim rules based on calculations unrelated to their network costs.

networks, to the provision of advanced telecommunications services to virtually all of the citizens of this nation regardless of where they live or work, and to reasonable rates for all users of these services. Sound policies are now required to ensure that there is not a return to the era when investment in rural, high-cost networks was non-existent and service availability was inferior.

The Coalition members are involved in, or are potentially affected by, proceedings in several states involving requests by WW for ETC designation. The proceedings in Nebraska, Minnesota, and Kansas present issues very similar to those that the SD PUC considered.⁷ In each state, the WW applications have generally been cursory, vague, internally inconsistent, and lacking in detail. The approach of WW in each case has been to recite only that it is a cellular carrier, that it intends to offer a fixed service, and that it promises to meet the universal service standards required of ETCs.

II. BACKGROUND: THE SOUTH DAKOTA PUC DECISION

A. APPLICATION

WW filed its ETC request on August 25, 1998, in the name of its affiliate, GCC License Corporation (“GCC”) for the area covering, in effect, the entire state of South Dakota.⁸ The Petition stated that GCC provides cellular service throughout the state, summarized seven of the nine services required by 47 C.F.R. § 54.101, and stated that it “will make available the universal services to all consumers in the exchange areas in which it seeks designation, and that it will

⁷ See Application No. C-1889 before the Nebraska Public Service Commission; MPUC Docket No. P-5695/M-98-1285 before the Minnesota Public Utilities Commission; and Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC before the State Corporation Commission of the State of Kansas.

⁸ GCC License Corporation, Petition for Designation as an Eligible Telecommunications Carrier, filed August 25, 1998, in SD PUC Doc. No. TC 98-146 (“WW ETC Request”).

advertise the availability of the ‘universal services’ in its designated service area.”⁹

With regard to the areas served by rural telephone companies, the Petition asserted that a grant would be in the public interest by making available (1) telecommunications services previously not available; (2) a wide range of service options; (3) expanded local calling areas; (4) mobility; (5) high reliability and quality of service; and (6) competitive pricing.

B. HEARING

An evidentiary hearing was conducted before the SD PUC, with all Commissioners in attendance, on December 17 and 18, 1998. The sole witness in support of WW’s case was Gene DeJordy, WW’s Executive Director of Regulatory Affairs. At the hearing, WW failed to convince the PUC that its “universal service” *is or would be* available to all consumers and failed to establish that the six claimed public interest benefits would be achieved.

(1) Availability of Supported Services

As it has in several other states, WW created significant confusion and obfuscation by simultaneously claiming that it is entitled to ETC designation because its *current cellular* service meets the Sec. 54.101 criteria, but that the service for which it would receive support was some other service not yet offered, the provision of which was contingent upon ETC designation.¹⁰ The hearing record demonstrates that the current cellular service does not meet the criteria of Section 54.101(a) and that the South Dakota PUC had substantial evidence to conclude that there was no reasonable assurance that the proposed “universal service” would meet the criteria.

Counsel for WW stated that its witness’s testimony would be “directed toward how GCC

⁹ *Id.* at 3. The application omitted reference to the local usage and toll blocking requirements.

¹⁰ *See, e.g.*, Initial Brief of GCC Licence Corporation, S.D. Doc. No. TC 96-160, January 28, 1999, at 8-25 (“Initial Brief”).

currently provides and meets those supported services,”¹¹ but did not establish that the cellular services meet the criteria. Also, despite the statement in pre-filed testimony that it “currently provides all of the core supported services, except toll limitation,” on the next page its witness described WW’s intent to comply in the future with any minimum local usage requirements imposed by the Commission, thereby acknowledging that WW does not currently offer local usage as required by Section 54.101(a)(2).¹² At the hearing, WW’s witness equivocated as to the proposed service, stating that one of its offerings would have unlimited usage, but another might have a usage component.¹³

WW attempted to deflect the fact of non-compliance by stating that it was not seeking universal service funding for its current mobile cellular service,¹⁴ but for a service not currently available. Its proposed “universal service offering” was described as a service based on wireless local loops established through equipment installed on customer premises and utilizing the existing cellular infrastructure.¹⁵ The customer equipment would include a device to establish the radio

¹¹ Transcript of Hearing, In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, before the South Dakota Public Utilities Commission, TC 98-146, (Dec. 17, 1998)(“Tr.”) at 7.

¹² See Testimony of Christopher R. Johnson (“Johnson Testimony”) at 8-9. In its FCC pleadings, WW has argued that there should be no minimum usage, a fact it did not disclose to the SD PUC. See, e.g., Reply Comments of WW, filed January 25, 1999, in CC Docket No. 96-45 at 6-11.

¹³ Tr. at 57-58. Note that there is conditional phrasing as to the nature of the service offerings.

¹⁴ Direct Testimony of Brian Kirkpatrick at 8. Mr. DeJordy, the sole witness for WW, adopted Mr. Kirkpatrick’s testimony, as well as that of Christopher R. Johnson at the hearing. Tr. at 18 and 20.

¹⁵ Initial Brief at 22; Tr. at 27-28. By simultaneously claiming, incorrectly, that its cellular service meets the Section 54.101(a) criteria and that its request for designation is for some other, future service, WW created doubts in the minds of the South Dakota Commissioners as to what its position really was.

channel and interface with the customer's CPE, as well as high gain exterior antennas.¹⁶

WW also acknowledged that its current signal does not cover the entire state, but claimed it would augment its facilities where necessary.¹⁷ However, the statements and demeanor of its witness raised legitimate doubts in the minds of the Commissioners as to the credibility of its commitment:

Mr. DeJordy:

. . . [W]e will fill in certain areas that do not have service. I can't tell you specifically up in the northwest. I would know in the extreme northern portion, which is, I understand, reservation, there may not be anyone that resides in that area that would be requesting service. . . . So if a customer asks for service there, we would provide the service.¹⁸ . . . there are certain areas, as you probably are well aware, within the state that, you know, either no one resides or no one ever goes. So there's really no need to have coverage there.¹⁹

. . . .

Commissioner Schoenfelder:

. . . [I]t may just interest you to know that up here where nobody goes and nobody lives, US West still has two exchanges there for which they serve and for which they receive no universal service I can also tell you that nobody goes there, but I did yesterday and I was over four or 500 miles of that yesterday, and most of my family lives there as well. . . .²⁰

(2) Public Interest Benefits

WW also claimed that grant of its request would provide six public interest benefits in the areas of rural telephone companies: services not previously available, a wide range of service options, expanded local calling areas, mobility, high reliability and quality of service; and

¹⁶ Tr. at 28.

¹⁷ Tr. at 81.

¹⁸ Tr. at 87.

¹⁹ Tr. at 88.

²⁰ Tr. at 105-106. Commissioner Schoenfelder's statements referred to the area encompassed by Perkins, Harding and Butte counties. Tr. at 187. These three counties form the northwestern corner of the state and consist of a combined area of 5,193 square miles, which is slightly larger than the State of Connecticut, and had a 1990 population of 7,566. Rand McNalley Commercial Atlas and Marketing Guide, 1993.

competitive pricing.²¹

(a) New Services/Service Options/Expanded Calling Area

At the hearing it became evident that WW's claims to differentiate its proposal from the incumbent's service were limited to calling scope and mobility.²² While it is true that the license areas of mobile carriers are generally larger than the local calling areas of incumbent LECs, because WW provided no documentation as to what its offerings would be, either by area, rate level or rate design, the SD PUC was unable to determine whether there would be any public benefit.²³ If, for example, WW offered an RSA-wide calling area at a price that is equal or greater than the incumbent's local service, plus short haul toll charges for the same area, there is no particular benefit to consumers. The FCC, in determining whether the *SD PUC Decision* was consistent with federal law, cannot assume a benefit which WW did not prove at the evidentiary hearing before the SD PUC.

Although WW distinguished its "universal service" from its mobile service, it also claimed that the mobility of the "universal service" would be an extra benefit to subscribers. Having claimed a mobility benefit, WW failed to explain how its fixed service offered any mobility.

²¹ WW ETC Request at 4. Although the SD PUC ultimately did not reach the issue of public interest in the areas of rural telephone companies, the hearing record is relevant to this proceeding and establishes a basis for the credibility issues with respect to the SD PUC findings of fact that WW did not show that its fixed wireless service could be offered to customers throughout the state. *SD PUC Decision* at para. 22.

²² WW stated that its affiliate held LMDS and PCS licenses in several areas of the state. WW ETC Request at 2. At the hearing, Mr. DeJordy acknowledged that the affiliates had not deployed either service in the state and had no customers.

²³ Tr. at 131: "Question: Can you explain what you mean in more detail regarding an expanded local calling area as it relates to the public interest determinations which the Commission will be deciding? Answer: Sure . . . We, the customer, would be able to have a much wider local calling area. It could be, you know, an entire community, I mean a county. It could be--there's a lot of variations to it."

(b) Quality and Reliability of Service

WW claimed in prefiled testimony that it has a “highly reliable, top quality telecommunications network for mobile and fixed customers,” but went on to state that the voice quality of the mobile service could not be compared to wireline service and that additional antenna towers and fixed wireless network equipment would need to be constructed.²⁴ It also acknowledged that the system has a data transmission capability of only 9.6 kilobytes per second.²⁵ WW provided no testimony as to whether its network, constructed for mobile service, would also need modification to accommodate the different traffic patterns and holding times of fixed service. Chairman Burg expressed his concern that the record did not establish sufficiently the potential reliability of the WW service: “[P]eople it’s been offered to say[] it won’t provide the voice grade service that I have over my landline . . . the thing that I struggle with as we look at this is what is that voice grade maintained at all times? Is it intermittent? Is it infrequent? Is it available someplace and not available to others”²⁶

(c) Competitive Pricing

WW stated in its Petition to the SD PUC that there would be a public interest benefit resulting from competitive pricing of telecommunications services, but at the hearing refused to discuss the pricing of its proposed service. The stated reason for not providing price information was that it could not set the rate without knowing the subsidy available.²⁷ In the absence of even

²⁴ Johnson testimony at 12.

²⁵ Tr. at 86.

²⁶ Tr. at 186-87.

²⁷ The current amount of subsidy which WW would receive as an ETC is, in fact, readily determinable by WW. The Commission’s rules specify that the second carrier receives the per-line support of the incumbent, and the amount the incumbent receives is publicly available. The fact that the incumbent’s amount may change in the future is no more of a problem for WW than for

(continued...)

an estimate of the price to be charged, the SD PUC could neither assess the claim of WW that its competitive pricing would be a benefit, nor assess the credibility (or lack thereof) of a business plan.

C. DECISION

In its May 19, 1999 decision, the SD PUC made detailed findings of fact, supported by the hearing record, and reached conclusions of law. The most significant of these are:

FINDINGS OF FACT

GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements The Commission disagrees GCC's current mobile cellular service . . . is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.²⁸

Thus . . . the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.²⁹

. . . GCC has failed to show that its current mobile cellular system is able to offer all the services . . . throughout the state.³⁰

. . . GCC is not offering fixed wireless service, nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.³¹

. . . [I]t is impossible to determine whether GCC will meet ETC requirements when it

²⁷(...continued)

any other ETC having to make investment and service pricing decisions today.

²⁸ *SD PUC Decision* at para. 8.

²⁹ *Id.* at para. 11.

³⁰ *Id.* at para. 12. The SD PUC concluded that WW had not demonstrated that it offered a service which provides users with a certain amount of flat-rated local usage (*i.e.*, calling without additional usage-based charges) consistent with the Commission's universal service rules. *Id.*

³¹ *Id.* at para. 18.

actually begins to provide a universal service offering through a fixed wireless system.³²

Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.³³

. . . GCC has not yet finalized what universal service offering it plans to offer to consumers... This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state.³⁴

. . . GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state GCC did not show to the Commission that it had a viable financial plan³⁵

CONCLUSIONS OF LAW

The Commission finds that pursuant to 47 U.S.C. 214(e), an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms³⁶

. . . [S]ince . . . GCC is not currently offering the necessary services, [the SD PUC] need not reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest.³⁷

The WW ETC Request was therefore denied. Because the SD PUC reached its decision based primarily on the lack of information, its evaluation of the credibility of the witnesses and their testimonies, and the resulting reasonable doubts regarding what were speculative statements

³² *Id.* at para. 19. Paragraphs 8, 11, and 19 demonstrate that the SD PUC found that the speculative and novel nature of the technical and service characteristics of WW's so-called "wireless local loop" prevented the SD PUC from any definitive findings with respect to the manner in which WW would meet the ETC requirements and serve the objectives of universal service.

³³ *Id.* at para. 22.

³⁴ *Id.* at para. 23.

³⁵ *Id.* at para. 24. The SD PUC found that the details of WW's service provision in Nevada did not correlate with its stated intentions for South Dakota. *Id.* at para. 25.

³⁶ *Id.* at para. 6.

³⁷ *Id.* at para. 7.

of WW, the SD PUC did not need to examine (and did not examine) a larger number of public policy issues and impacts that arise with the potential for multiple ETCs.

III. WESTERN WIRELESS HAS NOT ESTABLISHED A BASIS FOR PREEMPTION UNDER SECTION 253

A. SECTION 253(a) REQUIREMENTS

WW requests that the Commission preempt the *SD PUC Decision*, pursuant to Section 253(d), on the basis that it is a “barrier to entry” prohibited by Section 253(a).³⁸ WW provides no authority for the proposition that a state’s decision made pursuant to Section 214(e) may be reviewed by the Commission under Section 253 or any other section.³⁹ Because authority to preempt is not to be presumed, the proper forum to seek redress from such decisions appears to be an action in state or federal court. Regardless, WW did not raise Section 253 issues before the SD PUC.⁴⁰

Assuming, *arguendo*, applicability of Section 253, WW must show that this particular decision is either a “statute, regulation or other legal requirement.” However, WW does not state explicitly which provision it believes applies. Since the *SD PUC Decision* is clearly neither a

³⁸ WW Petition at 1-2 and 10. *See also* 47 U.S.C. §253(a): “In General.-- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

³⁹ The WW Petition does not refer to or follow the Commission’s suggestions for preemption requests. *See Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-195, November 17, 1998.

⁴⁰ The State of South Dakota has already been preempted by statute with respect to entry and rate regulation of CMRS providers, but the SD PUC Decision does not impose any entry or rate regulation. *See* 47 U.S.C. § 332(c)(3). Furthermore, nothing in the Act prohibits a State from regulating other terms and conditions of commercial mobile services. *Id.* Moreover, the Commission has not determined whether (and nothing in the Act suggests that) states are prohibited from regulating non-mobile (*i.e.*, fixed) local exchange services of CMRS providers. Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 8965, 8987 (1996).

statute nor a regulation, WW must show that it is a legal requirement. WW makes no effort to articulate how a decision finding an application unpersuasive constitutes, as a factual matter, a “legal requirement.” WW was required to demonstrate that the service for which it sought designation meets the requirements of 47 C.F.R. § 54.201. The SD PUC found, on the basis of the record at an evidentiary hearing, that WW’s service did not meet these criteria.

Assuming further, *arguendo*, that some state decision could be found to have established a “legal requirement,” the *SD PUC Decision* does not prohibit WW from offering any interstate or intrastate telecommunications service.⁴¹ Several of the Commission decisions under Section 253 cited by WW, apparently as applications of the Act’s “shall preempt” provision, involved explicit prohibitions and hence are of no relevance here. *Classic Telephone, Inc.* involved a refusal of cities to issue a local franchise. In *Pittencrieff Communications, Inc.*, the Commission did not preempt, but affirmed that CMRS providers are not exempt from contributing to state universal service mechanisms.⁴² In *Public Utility Comm’n of Texas*, the Commission preempted a statute prohibiting certain carriers from competing in exchange areas of incumbents serving less than 31,000 lines.⁴³ The *Silver Star Tel. Co. and Hyperion* cases also involved prohibitions on competition with incumbents.

Apparently recognizing that the *SD PUC Decision* does not prohibit WW from providing any service, WW is left with having to show how the decision will “have the effect of prohibiting” its ability to provide any telecommunications service. The only Commission decision cited for

⁴¹ See *Classic Telephone, Inc.*, 11 FCC Rcd 13082, 83 (1996); *Silver Star Tel. Co.*, 12 FCC Rcd 15639, 40, 46 (1997); and *Memorandum Opinion and Order*, In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, CC Docket 98-92, (May 27, 1999)(“*Hyperion*”), at paras. 1, 4 and 5.

⁴² *Pittencrieff Communications, Inc.*, 13 FCC Rcd 1735, 37 (1997).

⁴³ *Public Utility Comm’n of Texas*, 13 FCC Rcd 3460 (1997).

guidance in such cases, *New England Public Communications Council*, was not an analogous situation.⁴⁴ In that case, the Connecticut Department of Public Utility Control prohibited the provision of competitive payphone service, except by local exchange carriers. The Commission found that the difficulty and expense of becoming a LEC in order to provide payphone service significantly raises the costs and other burdens in ways that are unnecessary to the provision of payphone service.⁴⁵ Here, there is no prohibition on entry, only a conclusion that WW must demonstrate that it meets the requirements for universal service support.

To support the conclusion that the *SD PUC Decision* has such an “effect,” WW relies entirely on its own unsupported allegation that “it cannot possibly offer [the service] on a broad scale without high-cost universal support -- subsidized flat-rate service using WLL CPE.”⁴⁶ To the contrary, its argument that its current cellular service already includes all of the components of universal service identified by the FCC⁴⁷ raises an obvious, but unanswered question: If WW’s existing infrastructure has been made ubiquitously available without universal service support, why is support needed to provide a different service using the same infrastructure?⁴⁸ And where 70 percent of the incumbent’s lines currently receive no support and none will be available to WW in those study areas, why is its business plan so dependent on universal service support?⁴⁹ In such

⁴⁴ *New England Public Communications Council*, 11 FCC Rcd 19713 (1996), *recon denied*, 12 FCC Rcd 5215 (1997).

⁴⁵ *New England Public Communications Council*, 11 FCC Rcd at 19722. The Commission also found that the DPUC order violated Section 276 of the Act, an issue not relevant here.

⁴⁶ WW Petition at 12.

⁴⁷ Initial Brief at 12.

⁴⁸ The only apparent difference would be the CPE associated with WLL application.

⁴⁹ Universal Service Fund 1998 Submission of 1997 Study Results by the National Exchange Carrier Association, Inc., filed with the Commission on October 1, 1998, (“NECA USF Data”), Tab 6, 33-34.

circumstances, Section 253 cannot be found to be the savior of any entity that fails to carry its burden to make a credible, evidentiary case before the Congressionally designated finder of fact.⁵⁰

B. IF THE COMMISSION FINDS A VIOLATION OF SECTION 253(a), IT MUST THEN CONSIDER WHETHER THE STATE'S ACTION IS WITHIN ITS AUTHORITY UNDER SECTION 253(b)

Section 253(b) concerns are relevant to a state commission's evaluation of the credibility of an applicant for ETC designation. Assuming, *arguendo*, the Commission concludes that the *SD PUC Decision* violates Section 253(a), the Commission must still consider whether the decision was within the SD PUC's authority under Section 253(b) "to impose on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."⁵¹ As previously noted, the SD PUC had no opportunity to rule explicitly on this question, since WW did not raise any Section 253 arguments before it. Nevertheless, the specific issues of quality of service and universal service impact were raised, but WW's witness and spokesperson maintained at the hearing that universal service principles and objectives set forth in Section 254 may not be considered by a state commission.⁵² Following the subsequent decision by the Fifth Circuit expanding the issues states may consider, the SD PUC may well in future decisions expand on the Section 253(b) issues.

⁵⁰ The inadequacy of WW's evidentiary showing before the SD PUC is discussed in detail in Sections IV. and V., *infra*.

⁵¹ 47 U.S.C. § 253(b).

⁵² The fallacy in this argument is discussed in Section III. D., *infra*. WW's petition stated, however, that the SD PUC's "power to designate entities like GCC License Corporation as an ETC derives from Sections 214(e) and 254 of the Act." WW ETC Request at 2.

C. ETC DESIGNATION IS NOT ENTRY REGULATION

Disparate treatment among carriers is intended and explicitly created under the Act.⁵³ Specifically, the Act contains explicit language that grants to the States the authority to determine which carriers should be designated as ETCs.⁵⁴ Obviously, the law contemplates that some ETC applicants will not be designated by a state following a request.⁵⁵ Moreover, the Act explicitly provides state commissions with discretion to proceed with ETC designation to the extent “consistent with the public interest, convenience, and necessity.”⁵⁶ Finally, with respect to areas served by rural telephone companies, prior to the designation of a second ETC, the Act requires an additional finding by the State Commission that such designation “is in the public interest”⁵⁷ Under the Act, not all carriers are entitled to be designated as ETCs.

Section 214(e) is not competitively neutral; therefore, it is questionable whether Congress intended Section 253 to be applicable at all to such actions. States have authority to find that it is not in the public interest to designate a second carrier, and thereby exclude second ETCs in rural telephone company areas. If such limitation always failed the Section 253(b) competition neutrality test, there could be no point in States’ granting ETC designation. Moreover, there would be no meaningful purpose to these provisions if state commissions’ conclusions that a

⁵³ For example, the most onerous interconnection requirements only apply with respect to incumbent LECs. *See* 47 U.S.C. 251(c). Congress and the Commission have previously rewarded CMRS providers with generally more favorable regulatory treatment on several fronts by relieving CMRS providers of equal access, number portability, treatment as a LEC, rate regulation, and truth-in-billing requirements.

⁵⁴ 47 U.S.C. §214(e)(2).

⁵⁵ The authority granted the States to decide whether carriers are to be designated as ETCs is necessarily also the authority to deny ETC status. Grant or denial must be based on the statutory criteria.

⁵⁶ 47 U.S.C. § 214(e)(2).

⁵⁷ *Id.*

carrier has not demonstrated its qualifications to be designated an ETC are, on their face, competitively biased.

Under WW's interpretation, States would have no choice but to designate all carriers that request ETC designation based on representations of future "intent" because not being designated would be an unlawful "barrier." Adverse rulings with respect to ETC designation are obviously contemplated under the Act and, therefore, cannot be construed, on their face, to constitute "barriers to entry."

D. IN EVALUATING A SECTION 214(e) APPLICATION, STATES PROPERLY CONSIDER WHETHER DESIGNATION WILL SERVE THE PURPOSES OF SECTION 254

By requiring in Section 214(e) that carriers meet the criteria as a prerequisite to ETC designation and receipt of universal service support under Section 254, Congress necessarily intended that the two sections should be read together. Yet, under the construction urged by WW, an application which demonstrably harmed universal service, but met the technical requirements of Section 54.101(a) must be rubber stamped by state commissions, at least as to the areas served by non-rural telephone companies. WW acknowledges that where, as in South Dakota, it proposes to be designated for areas served by rural telephone companies, the state commission is also required to make a specific public interest finding.⁵⁸ This additional requirement, consistent with the distinction in Section 214(e)(2) that a State commission "shall" designate additional ETCs in the area of non-rural LECs and "may" designate in the areas of rural LECs, demonstrates Congress's decision that the special circumstances of rural LECs and rural

⁵⁸ See 47 U.S.C. § 214(e)(2). This finding that, in areas served by rural telephone companies, the designation is in the "public interest" is in addition to the general requirement applicable to all designations that the state commission's action be "consistent with the public interest, convenience and necessity."

customers necessitate additional judgement by state commissions. The argument that the objectives of Section 254 should not be considered in making Section 214(e) determinations is thus erroneous and should not be sanctioned by this Commission.

The SD PUC is even more justified in its concerns when WW maintains that the universal service principles and objectives outlined in Section 254 of the Act⁵⁹ are not and should not be relevant to States' ETC designation considerations.⁶⁰ WW neglects to realize that Section 214(e)(1) explicitly states that designation of an ETC is "in accordance with section 254 . . .,"⁶¹ that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive . . . support,"⁶² and that "[a]ny such support should be explicit and sufficient to achieve the purposes of this section [254]."⁶³ WW apparently wants to maintain the irrational notion that a state's purpose in designating ETCs (*i.e.*, to foster an environment under which the goals of advancing and preserving the universal service principles are served) should be disregarded when a state decides whether to designate ETCs.

Just as the Commission demands deference to its judgements when it is before the Court of Appeals, the Commission must defer to the judgement of state commissions operating within the area of responsibility assigned to them by Congress.

⁵⁹ These objectives include, but are not limited to: (1) service quality; (2) reasonable, comparable, and affordable rates; (3) specific, predictable and sufficient support to preserve and advance universal service; and (4) availability of services, including advanced services, in rural and high cost areas. See 47 U.S.C. §254.

⁶⁰ See, *e.g.*, WW Petition at 23 and n. 52.

⁶¹ 47 U.S.C. § 214(e)(1).

⁶² 47 U.S.C. § 254(e).

⁶³ *Id.* (emphasis added).

E. THE 5TH CIRCUIT DECISION EMPHASIZES THE BROAD SCOPE OF A STATE COMMISSION'S EVALUATION OF A SECTION 214(e) APPLICATION

Throughout the South Dakota proceeding and in its Petition, WW has emphasized the Commission's conclusion at paragraph 135 of the *Universal Service Decision* that: "The statute does not permit . . . a state commission to supplement the section 214(e)(1) criteria"⁶⁴ WW now argues in its Petition that the SD PUC erred in considering additional criteria, such as pricing.⁶⁵

Since the filing of the WW Petition, the U.S. Court of Appeals for the Fifth Circuit has issued its decision reversing the portion of the *Universal Service Decision* that precluded States from considering other factors on the grounds that it violated the plain meaning of the Act.⁶⁶ Therefore, not only is this line of argument no longer available to WW, but the potential is established, if the SD PUC were required to rehear WW's petition, or a subsequent petition by WW or any other carrier is presented for consideration, that the SD PUC may well establish additional conditions. In any event, to the extent the SD PUC decision can be found to have established additional conditions, that fact does not require preemption. The Fifth Circuit did recognize that a state might impose such onerous conditions that an otherwise eligible carrier could not receive designation, but, as explained in Sections IV and V, WW has not made such a case.⁶⁷ Clearly, a state is not precluded from imposing a requirement that a carrier conform to the plain language of the Act before receiving ETC designation.

⁶⁴ GCC Initial Brief at p. 35; Reply Brief at p.22.

⁶⁵ WW Petition at 23.

⁶⁶ *Texas Office of Pub. Util. Counsel v. FCC*, No. 97-60421 (5th Cir. July 30, 1999).

⁶⁷ *Id.* at n. 31.

IV. THE SD PUC WAS JUSTIFIED UNDER THE LAW AND THE FACTS IN REFUSING TO DESIGNATE WW AS AN ETC SOLELY ON PROMISES

A. THE *SD PUC DECISION* IS CONSISTENT WITH THE PLAIN MEANING OF THE CONTROLLING STATUTE

Despite WW's arguments,⁶⁸ the plain meaning of the Act supports the SD PUC decision that, to be designated as an ETC and prior to actually receiving ETC high cost support, carriers actually must offer and advertise the required services throughout the area in which the carrier is seeking ETC designation. The Act states that the state commission shall designate a carrier that "meets" the requirements of 47 U.S.C. §214(e)(1).⁶⁹ Section 214(e)(1) commands that an ETC, throughout the service area, offer the services that are supported by Federal universal service support and advertise the availability of and charges for such services.⁷⁰ These words are in stark contrast to WW's alternative view that these phrases should mean "intends to meet" or has stated a "commitment to meet" these requirements. The Commission's own procedures for ETC designation under Section 214(e)(6) state that the offering of service is in the present, not future, tense.⁷¹

By its own admission, WW does not offer the required services anywhere, much less

⁶⁸ "The SDPUC's legal interpretation of Section 214(e) is fundamentally inconsistent with the 1996 Act and the FCC's implementing policies and rules." WW Petition at 8.

⁶⁹ "A State commission shall . . . designate a common carrier that meets the requirements of paragraph (1)" 47 U.S.C. §214(e)(2).

⁷⁰ "A common carrier designated as an eligible telecommunications carrier under paragraph (2) . . . shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received-- (A) offer the services that are supported . . . ; and (B) advertise the availability of such services and the charges therefor" 47 U.S.C. §214(e)(1).

⁷¹ Procedures For FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, 12 FCC Rcd 22947 (1997).

throughout the service area, and does not advertise the availability of the required services.⁷² Also, not only is WW unwilling even to state what the charges for its “universal service offering” are, but WW wants the Commission to conclude that the charges should be deemed irrelevant with respect to ETC designation considerations by States.⁷³ WW’s entire argument is based on the unsustainable supposition that it should be designated an ETC without having to offer and without specifying the charges for the required services. However, WW’s refusal to provide this and many other details is evidence that the SD PUC applied proper judgement with respect to whether WW’s technical, service, and business plans are real and credible or whether its ETC request is simply a scheme to raid the USF fund.

Notwithstanding the fact that WW does not satisfy the statutory requirements, a state commission decision (as a first step) concluding that a carrier would be entitled to receive support once a carrier actually satisfies the controlling requirements (*i.e.*, if WW actually fulfills its speculative intent, then it could receive ETC universal service support) would not, in any event, meaningfully denote “designation.” From the perspective of the rewards WW seeks with ETC designation, there is only one critical distinction: under what conditions and when would it qualify to receive universal service cost recovery support?

WW relies on the Commission’s decision in *Fort Mojave Telecommunications, Inc.* for the proposition that the Commission has granted ETC status (pursuant to Section 214(e)(6)) to several carriers based on a conclusion that each carrier “offers or will be able to offer all of the

⁷² Despite WW’s attempts at confusion and obfuscation, it cannot deny that it does not offer the fixed service utilizing specific customer premises equipment according to a flat-rate price for unlimited local usage, nor does it offer toll limitation service to low income subscribers. See Section II. B. 1, above.

⁷³ WW Petition at 22-25.

services designated.”⁷⁴ The “will be able to” phrase in that order was not a general statement purporting to waive the requirements to offer the designated services, but only a reference to the fact that the Commission had, pursuant to 47 C.F.R. 54.101(c), granted an extension of time to one of the four applicants, based on “exceptional circumstances” to complete network upgrades necessary to provide toll-limitation service.⁷⁵ Unlike WW’s proposal to offer service, which the SD PUC did not find credible on the basis of an evidentiary hearing, the carrier in *Fort Mojave* was in operation and providing service.

WW did not plead “exceptional circumstances” and ask the SD PUC for an extension of time to provide any of the supported services. Section 54.101(c) only provides for such extensions to carriers “otherwise eligible” and only for upgrades to provide single-party service, access to E-911, or toll limitation. The very existence of the limited time extension provided by the rules necessarily shows that the Commission understands the requirement of Section 214(e) to be a present offering. In adopting the extension rules the Commission stated:

Consistent with the Joint Board’s recommendation, we conclude that eligible carriers *must provide* each of the designated services in order to receive universal service support. In three limited instances, however, we conclude that the public interest requires that we allow a reasonable period during which otherwise eligible carriers may complete network upgrades required for them to begin offering certain services that they are currently incapable of providing.⁷⁶

Accordingly, the SD PUC is entitled to reject such a two-step process because it understands that once “designation” is granted, it may require a long, litigious process to reverse

⁷⁴ WW Petition at 15, citing (with incorrect citation) *Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 13 FCC Rcd 4547 1998).

⁷⁵ *Id.* at 4553.

⁷⁶ *Federal State Joint Board on Universal Service*, CC Doc. No. 96-45, 12 FCC Rcd. 8776, 8826 (1997) (emphasis added, internal citations omitted).

such designation for non-compliance.⁷⁷ Therefore, a state cannot and should not be preempted simply because the state commission has ruled, as has the SD PUC, that the first step is not sufficient for ETC designation.

B. THE COMMISSION'S PREVIOUS STATEMENTS REGARDING DESIGNATION AND THE RIGHT TO RECEIVE SUPPORT ARE CONSISTENT WITH THE SD PUC CONCLUSIONS

Contrary to WW's contentions,⁷⁸ the Commission's previous statements regarding designation, on the one hand, and a carrier's right to receive support funds, on the other, are consistent with the SD PUC action. A careful reading of the more complete Commission statement exposes WW's confusion and leads to the conclusion that the *SD PUC Decision* is exactly consistent with the statement:

. . . [A] carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and then must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support. Indeed, the language of section 254(e), which states that "only an eligible telecommunications carrier designated under section 214(e) shall be *eligible* to receive" universal service support, suggests that a carrier is not automatically entitled to receive universal service support once designated as eligible.⁷⁹

The actual conclusions here are, first, a carrier may be designated as an ETC if it satisfies the terms of Section 214(e) and, second, a designated ETC is not entitled to receive support until it actually is providing service to customers which can be counted. The "then" condition can only mean that the second action must come after the first. WW confuses the two actions: qualification to be designated an ETC as opposed to the actual provision of service by a designated ETC to customers which, under the Commission's current rules, forms the quantitative

⁷⁷ More properly, the designation should not actually exist until there is compliance.

⁷⁸ See WW Petition at 9, n. 22, and 13.

⁷⁹ 12 FCC Rcd. 8776, 8853 ("*Universal Service Decision*") at para. 137 (footnote omitted, underlining added for emphasis, and italics in original).

basis upon which a competitive ETC receives support.⁸⁰ The Commission's statement means that designation is a necessary, but not a sufficient, condition to be entitled to receive support. The statement explicitly states that the threshold requirements that a carrier must offer, must advertise, and must specify the price for its universal service offering must be met in order to be designated an ETC.⁸¹ First, WW has not met the conditions for ETC designation, and, second, WW is not entitled to receive universal service support until it satisfies these conditions, is designated an ETC, and is actually providing universal services to customers. Nowhere does the Act or the Commission's policies suggest that meeting the requirements of Section 214(e) means "intention to meet" or "commitment to meet" these requirements.

C. WW HAS NOT BEEN PROHIBITED FROM PROVIDING ANY INTRASTATE OR INTERSTATE SERVICE

WW testified that it provides traditional wireless cellular mobile services to over 98% of South Dakota and does so without ETC designation. WW apparently does not want to provide some other version of wireless services unless it is to be rewarded with future ETC designation. Regardless, WW has never been prohibited by any action of the State of South Dakota from providing any interstate or intrastate service using its CMRS spectrum.⁸²

In seeking ETC designation initially and preemption now, WW attempts cleverly to invent a distinct service that it calls a "universal service offering"⁸³ for the apparent purpose of arguing

⁸⁰ See 47 C.F.R. § 54.307(a).

⁸¹ The very next paragraph in the *Universal Service Decision* states that "[a]s discussed immediately above, a carrier's status as an eligible carrier is contingent upon its offering the currently supportable services." *Id.* at 8853-4 (para. 138).

⁸² WW testified in South Dakota that there has been no customer demand for fixed wireless services. Tr. at 101.

⁸³ There really is no such "universal service offering" service as WW hypothesizes. Instead, there is a list of telecommunications services that a carrier must offer and a set of requirements
(continued...)